

November 10, 2009

Via Electronic Filing System

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW - Room TW-A325
Washington, DC 20554

Re: Petition for Declaratory Ruling -- MB Docket Number 09-13, CSR-8128

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's Rules, this *Ex Parte* Notice is filed on behalf of Comcast Corporation ("Comcast"). On November 9, 2009, Kathryn A. Zachem of Comcast had separate discussions by phone with Sherrese Smith, Legal Advisor for Chairman Genachowski; Rick Kaplan, Legal Advisor for Commissioner Clyburn; and Bill Lake, Chief of the Media Bureau. Additionally, James Coltharp of Comcast had separate discussions by phone with Rosemary Harold, Legal Advisor to Commissioner McDowell; Jamila Bess Johnson, Legal Advisor to Commissioner Copps; Brad Gillen Legal Advisor to Commissioner Baker; and Nancy Murphy, Mary Beth Murphy, and Bob Ratcliffe of the Media Bureau. Mr. Coltharp was joined on these calls by Jonathan Friedman of Willkie Farr & Gallagher LLP.

Each of these calls focused on Comcast's revised plans for digital carriage of public, educational, and governmental ("PEG") access channels in relation to the issues raised in the Dearborn Petition for Declaratory Ruling (CSR-8128) ("Dearborn Petition"). The Dearborn Petition arose from the federal district court proceeding in Michigan in which the court requested Commission guidance on whether Comcast's plan to digitize analog PEG channels -- while continuing to carry local broadcast stations in analog on the basic service tier -- was consistent with the Communications Act and Commission rules. The Comcast representatives conveyed the following information in their calls:

- In the two years since this dispute arose with the petitioning franchising authorities, Comcast has pursued other analog reclamation efforts in order to bring expanded digital service offerings to customers. In light of those efforts, Comcast was able to reassess its PEG plans in Michigan. Under its new approach, with respect to each Comcast cable

system in Michigan, Comcast will continue to deliver PEG channels in analog format on the basic service tier until Comcast digitizes the entire basic service tier on that cable system, or unless a franchise authority otherwise agrees to digital PEG channels, whichever occurs first.

- Comcast communicated its new PEG carriage plans for Michigan systems in a November 6, 2009 letter sent to the four Michigan communities on the Dearborn Petition. A copy of that letter is attached to this *Ex Parte* Notice.
- Comcast planned to advise the federal district court in Michigan of its revised PEG plans for Michigan in a filing to be made with the court on November 10, 2009. That filing, which was made earlier today, emphasizes that Comcast's new carriage plan in Michigan moots the core issue in the court case. A copy of the court filing is attached to this *Ex Parte* Notice.
- Comcast will ask the four participating Michigan communities to join Comcast in seeking dismissal of the Michigan court proceeding.
- Comcast believes there is no longer a need for the Commission to provide guidance to the Michigan court with respect to Comcast's PEG digitization plans. In light of Comcast's new approach, there is no longer a case or controversy involving Comcast's PEG plans, and therefore no need for the Commission to address the Comcast-specific issues raised in the petition for declaratory ruling.

Please direct any questions or correspondence to the undersigned.

Very truly yours,

Davis Wright Tremaine LLP



Wesley R. Heppler

Enclosures

cc: Sherrese Smith, w/enclosures
Rosemary Harold, w/enclosures
Jamila Bess Johnson, w/enclosures
Rick Kaplan, w/enclosures
Brad Gillen, w/enclosures
Bill Lake, w/enclosures
Bob Ratcliffe, w/enclosures
Nancy Murphy, w/enclosures
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November 6, 2009

Via Facsimile & U.S. Mail

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Re: **PEG Channels & Digital Service**

Dear Counselors,

I am writing regarding the Cities' and Townships' lawsuit opposing Comcast's plan in Michigan to provide PEG channels in digital format while broadcast channels are still offered in analog. The lawsuit was filed January 14, 2008 and is currently stayed pending answers to certain questions posed by the Judge to the Federal Communications Commission.

In the nearly two years that have passed since the lawsuit began, Comcast has pursued other measures to expand our service offerings to customers. In light of those efforts and advances in equipment and technologies, we no longer intend to change PEG channels from analog to digital delivery prior to digitizing our entire basic service tier in the cable systems we operate in Michigan unless individual franchise authorities are interested in pursuing digital options with us. Accordingly, the issues presented in the lawsuit are moot. We would like to work with you to avoid either side incurring additional litigation expenses.

Comcast intends to file a report with the court next week stating that we are no longer pursuing our plan to change PEG analog channels to digital in Michigan and that, with respect to each cable system we operate in Michigan, we will continue to deliver PEG channels in analog format on the basic service tier until Comcast digitizes the entire basic service tier on that cable system, or unless a franchise authority otherwise agrees to digital PEG channels, whichever comes first. We would be pleased to work with you to make a subsequent joint filing to dismiss the case without prejudice if you concur.

I am available at your earliest convenience to discuss this further. Thank you for your consideration and courtesy.

Sincerely,

Cc: Robert G. Scott, Jr., Esq.
Michael S. Ashton, Esq.

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CITY OF DEARBORN, et al.,

PLAINTIFFS,

v.

COMCAST OF MICHIGAN III, INC., et al.

DEFENDANTS.

Case Number: 08-10156
Hon. Victoria A. Roberts

STATUS REPORT AND REQUEST FOR RULE 16 CONFERENCE

Comcast of Michigan III, Inc., et al. (collectively "Comcast") respectfully submit this Status Report regarding the facts underlying this dispute and the Court's "Opinion and Order" dated January 14, 2008 (Doc. # 7)("Order"), and request a conference pursuant to Rule 16(a) of the Federal Rules of Civil Procedure, and Local Civil Rule 16.1(b), to explore the expeditious disposition of this action.

By way of background, the Plaintiffs initiated this action to enjoin Comcast from pursuing a plan to change the delivery of public, educational and governmental ("PEG") channels in their communities from analog to digital, while keeping those PEG channels on basic service. The Court subsequently issued its Order enjoining Comcast's PEG digitization plan.¹

Nearly two years have passed since the Court entered its Order preserving the status quo as to PEG channels in Michigan. In the interim, the real-world basis for the underlying dispute has changed substantially. As Comcast recently informed each of the Plaintiffs, Comcast has pursued other measures to expand its service offerings to customers, and is no longer pursuing its

¹ Order at 15.

former plan in Michigan to provide PEG channels in digital format while broadcast channels are still offered in an analog format. Instead, with respect to each Comcast cable system in Michigan, Comcast will continue to deliver PEG channels in analog format on the basic service tier until Comcast digitizes the entire basic service tier on that cable system, or unless a franchise authority otherwise agrees to digital PEG channels, whichever occurs first. Comcast provided this information to Plaintiffs' counsel by phone last week, and confirmed this information in a letter dated November 6, 2009, submitted as Attachment A to this Status Report.

Based on these revised plans, Comcast also informed the Plaintiffs that it believes the issues presented in this case have become moot. Further, Comcast offered to work with Plaintiffs to make a subsequent joint filing to dismiss this case.

Separately, of course, this Court referred seven questions to the Federal Communications Commission ("FCC") to address as a matter of primary jurisdiction.² Plaintiffs subsequently filed a joint Petition for Declaratory Ruling with the FCC with respect to Comcast's PEG digitization plan, in which they explained that keeping PEG channels in analog until all basic channels are digitized would resolve their concerns about the treatment of PEG channels relative to broadcast channels.³ The FCC initiated a proceeding to consider the Court's questions and the

² See "Order Referring Seven Questions to the Federal Communications Commission Pursuant to the Primary Jurisdiction Doctrine," Document # 69 (November 26, 2008).

³ See "Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in *City of Dearborn et al. v. Comcast of Michigan III, Inc. et al* of the City of Dearborn, Michigan; the Charter Township of Meridian, Michigan; the Charter Township of Bloomfield, Michigan; and the City of Warren, Michigan," MB Docket No. 09-13 (filed December 9, 2008) at p. 21 (available at <http://fjallfoss.fcc.gov/ecfs2/document/view?id=6520195539>) ("It is obviously the case that a cable operator may provide all its signals in a digital format. This would require a customer to purchase/lease digital receiving equipment to view any signals, including PEG signals. Problems arise when the PEG channels are treated discriminatorily. The answer to the court's question is: requiring customers to purchase/lease equipment does not per se mean the PEG channels are on a separate tier. It depends, inter alia, on what is required to receive broadcast signals on the basic service tier.").

Plaintiff's petition.⁴ Comcast, the Plaintiff communities, and others participated in the consolidated FCC proceeding, which remains pending. On November 9, 2009, Comcast informed FCC staff of its change in business plans regarding PEG channel carriage in Michigan.

Given that Comcast is no longer pursuing its former plan which gave rise to the Complaint and will now pursue a plan that Plaintiffs' FCC filing recognizes as appropriate, Comcast respectfully submits that a conference could assist the parties in working toward dismissal of this action. Pursuant to Local Civil Rule 16.1(b), Comcast therefore requests that the Court hold a conference with the parties to consider these developments.

Respectfully submitted,

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s/Michael S. Ashton
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Attorneys for Defendants

Date: November 10, 2009

⁴ See *Entities File Petitions for Declaratory Ruling regarding Public, Educational, and Governmental Programming*, FCC Public Notice, MB Docket No. 09-13 (rel. Feb. 6, 2009).

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Michael J. Watza, Cheryl A. Verran, Joseph Leonard Van Eaton, William H. Irving, William P. Hampton, Thomas D. Esordi, and Mary Michaels, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant:

David L. Richards
Warren City Attorney
1 City Square, Suite 400
Warren, MI 48093

s/Michael S. Ashton
Michael S. Ashton